82-1236

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. 82-1236

B. H. MORTON and THOMAS KENT, Petitioners,

v.

ZIDELL EXPLORATIONS, INC., Respondent.

BRIEF OF RESPONDENT ZIDELL EXPLORATIONS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Zidell Explorations, Inc., defendant below, urges the court to deny the petition of B. H. Morton and Thomas Kent for certiorari.

QUESTIONS PRESENTED FOR REVIEW

Respondent Zidell Explorations, Inc. does not agree with petitioner's statement of the question presented for review. The question is more accurately stated as follows:

Is a "red letter" clause in a marine repair contract enforceable under this

court's holding in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629, 99 L.Ed. 11 (1955), where the parties work concurrently on the vessel and are concurrently negligent in causing a fire which damages the vessel?

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STATEMENT OF THE CASE

Petitioners B. H. Morton and Thomas Kent (hereinafter "petitioners" or "owners") seek review of a judgment enforcing a "red letter" exculpatory clause in a ship repair contract entered into between petitioners and Zidell Explorations, Inc. (hereinafter "respondent" or "Zidell"). Petitioners contend that the contract was procured by economic coercion and that enforcement of the "red letter" clause is barred by this court's holding in the *Bisso* trilogy.[1]

Magistrate Edward A. Leavy for the United States District Court for the District of Oregon declined to extend *Bisso* and its progeny, all of which involve

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[1] *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629, 99 L. Ed. 11 (1955) (hereinafter "*Bisso*"); *Boston Metals Company v. S/S Winding Gulf*, 349 U.S. 122, 75 S. Ct. 649, 99 L.Ed. 933 (1955); *Dixilyn Drilling Corp. v. Crescent Towing and S. Co.*, 372 U.S. 697, 83 S. Ct. 967, 10 L.Ed. 2d 78 (1963).

towage contracts, to a shipyard repair contract (Pet. 22a). The District Court held that the exculpatory clause was not void as against public policy absent a showing of overreaching or unequal bargaining power (Pet. 22a). The District Court concluded that petitioners were not overreached, were not in an inferior bargaining position and that there was no evidence that Zidell commands a monopoly in the ship repair business or that petitioners could not have taken their repair work elsewhere (Pet. 22a).

The Ninth Circuit Court of Appeals affirmed. The court relied upon *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F.2d 531 (9th Cir. 1941), *cert. denied* 314 U.S. 690 (1941), which holds that "red letter" clauses in *ship repair* contracts are enforceable and *not* against public policy. *Hall-Scott, supra*, 122 F.2d at 537. The Ninth Circuit reaffirmed its

holding in *Hall-Scott, supra*, and ruled that, absent overreaching, "red letter" clauses in ship repair contracts will be enforced (Pet. 11a). The Court affirmed the District Court's finding that petitioners had *not* been overreached (Pet. 10a).

Petitioners purchased an old river push boat and delivered it to Zidell in October of 1978 for conversion into a freezer-processor vessel (CR 17; PTO 2; RT 171, 226). Petitioners were soon obligated to Zidell for $195,484 for work performed (CR 17; PTO 3; RT 336, 368). The parties entered into a formal, written contract to continue the conversion work on January 24, 1979 (Exs. 3, 4). The first paragraph recited the following "red letter" or "exculpatory" clause:

> "*UNDERSTOOD AND AGREED*:
>
> "1. Pending delivery of the Vessel by Second Party [Zidell] to First Party [petitioners], all risk of loss

> of or damage to the Vessel shall be upon first Party [petitioners], and all and any insurance affording coverage for perils to which the same may be exposed pending such delivery, procured or provided by First Party [petitioners], shall inure to the benefit of First Party [petitioners]. Second Party [Zidell] shall not, under any circumstances whatsoever, be chargeable with or liable for damages, direct or consequential, sustained by First Party [petitioners] by reason of the loss of, damage to, or delays in delivery of, said Vessel." (Exs. 3, 4)

Mr. Thomas A. Sherwood, counsel for Zidell and primary draftsman of the contract (Exs. 3, 4; RT 322), testified that the above paragraph was included because the two entities were massing men and equipment on a single job and Zidell did not wish to be liable for any loss under such circumstances (RT 325-326). He placed the item first to assure prominence (RT 326, 331-332). Mr. Albert D. North, plaintiffs' insurance broker (RT 298), testified that such clauses are common in

building and repair contracts (RT 299-300). Zidell invariably agrees to such a clause when it takes vessels to other yards for repairs (RT 327).

Plaintiffs are knowledgeable and experienced businessmen. Each possesses considerable marine and business experience. Mr. Kent, a 58-year-old Seattle businessman, has spent many years in the construction service, including the last twelve years in boat and marine construction (RT 170). Mr. Morton, a 54-year-old Seattle businessman, operates companies in the marine equipment business (RT 187). He owns fifty percent of a corporation which fabricates and builds 32-foot aluminum gill net fishing boats (RT 187-188). He is also sole owner of Morton Marine Equipment which buys and sells tugs, barges and other floating equipment (RT 188). He testified that he buys and sells up to thirty pieces of

equipment a year in this company (RT 227). Morton Marine Equipment owns more than an acre of dry land and an acre of underwater land and maintains two good-sized buildings on the premises (RT 188). Mr. Morton has been in this business for two decades (RT 189).

Petitioners read and voluntarily signed the contract (RT 203, 205, 226-228, 277-278, 287, 339, 341, 351). They took a copy with them when they left the Zidell offices (RT 354). Mr. Morton declined to have an attorney review the document (RT 216), but conceded that he had ample opportunity to do so (RT 240). He understood the exculpatory language when it was read to him at trial (RT 226). Mr. Kent admitted that the terms were acceptable to him (RT 287). Neither man objected to the agreement or expressed any reservation (RT 339, 341). According to Mr. Paul W. Osmond, Jr., Zidell credit

manager (RT 335), petitioners spent the better part of an hour reviewing the contract (RT 351). Petitioners effected a policy of builder's risk insurance effective on January 25, 1979 -- the day following the signing of the contract with Zidell (RT 234, 301, 239).

The January 24, 1979 contract provided, *inter alia*, that the sum of $200,000 was to be due upon execution of the contract (Exs. 3, 4). Zidell ceased repair work until petitioners paid the agreed-upon sum of $200,000 (RT 200, 271, 293, 342). Petitioners received interim financing in early March, 1979 (Ex. 7, RT 208). Mr. Morton conceded that Zidell was not obligated to proceed under the contract until the above amount was paid (RT 230-231). The sum of $200,000 was paid in March (RT 228, 230), at which time work resumed (RT 280, 288). Petitioners acknowledged that after the March payment,

nothing prevented them from removing the vessel from Zidell's shipyard and employing another ship repair facility (RT 223-224). The vessel was rebuilt and put into service after the fire by a competitor of Zidell, Floating Marine Ways (RT 220, 222-223).

Petitioners worked closely with Zidell in the conversion (RT 173); Mr. Kent and petitioners' crew were present aboard ship almost daily, working concurrently with respondent's employees (RT 171-173; 270). Mr. Emil Mix, Zidell's estimator/coordinator, worked daily with Mr. Kent to decide how to dismantle and convert the vessel (RT 318). Mr. Mix testified that Mr. Kent was aboard "at all times" (RT 318). Petitioners determined what needed to be done as the work progressed and Mr. Mix reduced their directions to pencil and paper sketches (RT 319, 195, 196, 173). Petitioners agreed that they made constant changes (RT 222). On the date of the

fire -- May 2, 1979 (CR 17; PTO 4) -- Mr. Morton and Mr. Kent were present during the day (RT 174). They and their crew were finishing painting the vessel's pilot house (RT 181-182).

The fire occurred during the night shift of May 2, 1979 (CR 17; PTO 4). Zidell's employees were welding a bulkhead at a location specified by petitioners and at Mr. Kent's orders (RT 308, 310). Mr. Robert Guerra, a Zidell supervisor (RT 305-306), testified that no fire watch was possible because Mr. Kent maintained a locked room adjoining the welding area (RT 307-308, 315-316). No one on the Zidell crew had been given a key to the room (RT 309). Mr. Guerra testified that Mr. Kent kept supplies within the locked room (RT 307-308).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. This Court Has Never Extended the *Bisso* Trilogy Beyond Towage Contracts and Should Not Do So in this Instance Because the *Bisso* Public Policy Concerns Are Absent and the Facts Are Otherwise Dissimilar.

The Ninth Circuit, in *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F.2d 531 (9th Cir.), *cert. denied*, 314 U.S. 690 (1941), held that, absent overreaching, "red letter" clauses in ship repair contracts will be enforced. The court

carefully distinguished ship repair contracts from towing contracts.[2]

In the case at bar, the Ninth Circuit merely affirmed and applied the rule of *Hall-Scott* (Pet. 11a). The court emphasized that it did *not* purport to circumscribe *Bisso*'s continued application to towage cases (Pet. 11a). The court added that *Bisso* did not overrule *Hall-Scott, supra, sub silentio* because *Bisso* has *only* been applied to towage contracts (Pet. 10a).

Bisso reaffirmed a longstanding maritime law: that a "red letter" clause

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[2]The *Hall-Scott, supra,* court discussed, *inter alia, The Steamer Syracuse,* 12 Wall. 167, 79 U.S. 167, 20 L. Ed. 382, and *Compania de Navegacion v. Fireman's Fund Ins. Co.,* 277 U.S. 66, 48 S.Ct. 459, 72 L. Ed. 787 (a clause in a towage contract declaring that the towing boat shall not be responsible in any way for loss or damage to the tow, does not release the former from loss or damage by virtue of the negligence of her master or crew) (as cited in *Hall-Scott, supra,* 122 F.2d at 535).

in a *tugboat towing* contract is void as against public policy. *Bisso*, 349 U.S. at 632. The Ninth Circuit is in accord. *D.R. Kincaid, Ltd. v. Trans-Pacific Towing, Inc.*, 367 F.2d 857, 858-859 (9th Cir. 1966).

The stated policy reasons which underlie the rule of *Bisso* are, (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. *Bisso*, 349 U.S. at 633. In addition: "increased maritime traffic makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions." *Bisso*, 349 U.S. at 633. The *Bisso* rule sprang from a judicial hostility toward release-from-negligence contracts, particularly those made by businesses dealing widely with the *public* and

possessing potential *monopolistic* powers. *Bisso*, 349 U.S. at 631. The Supreme Court, however, has *never* extended the holding of *Bisso* to a situation in admiralty other than towage, and petitioners cite no authority to the contrary.[3]

Petitioners acknowledge that "red letter" clauses are upheld by the Supreme Court in pilotage contracts (Pet. 13). In *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 91, 53 S. Ct. 135, 77 L. Ed. 311 (1932), a unanimous Supreme Court *upheld* an exculpatory clause in a maritime pilotage situation. The court was persuaded by the following: (1) the pilot was *not* a common carrier or bailee and its services were

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[3]Petitioners boldly overstate both the *Bisso* opinion and its application in the circuits by contending that *Bisso* is applicable to all *non-pilotage* maritime contracts (Pet. 13). The opinion does not purport to extend beyond towage situations. For a case in which a $1,000 per day limitation was *upheld* in a *towage* contract, *see Canarctic Shipping Co. v. Great Lakes Towing Co.*, 670 F.2d 61 (6th Cir. 1982).

less than towage, 287 U.S. at 294; (2) the pilot had no exclusive privilege or monopoly and the shipowners were free to turn down the pilot's proffered services, 287 U.S. at 294; and, (3) the parties dealt at arms length, 287 U.S. at 294.

The case at bar meets each of the above criterion, and more. Zidell provides neither towage, common carrier or other service affected with a public interest. It has no monopoly on the local ship repair business by petitioners' own admission (RT 222-224). The parties combined efforts to perform the work and the jury found *concurrent* negligence (RT 455-456). Zidell did not possess sole and exclusive control of the vessel (RT 171-173, 222, 270, 308, 310, 318). The District Court found that petitioners were not overreached (Pet. 22a).

Compare *Bisso* and its progeny. In each case, towage was the subject of the

contract. In each case, the towing company possessed a monopoly power. In each case, the towing company's sole negligence caused the loss. In each case, the towing company exercised sole and exclusive control over the owner's barge. As the Texas District Court remarked in *Hudson Waterways Corp. v. Coastal Marine Serv., Inc.*, 436 F. Supp. 597, 605 (E.D. Tex. 1977), "Towage cases stand in a unique position in the law of admiralty." The instant case does not fall within that unique category.

Magistrate Leavy concluded that petitioners presented *no evidence* that the policy considerations of *Bisso* are or should be applicable to shipyards (Pet. 21a). Nevertheless, petitioners contend that the Ninth Circuit "ignored" the negligence deterrence rationale of *Bisso* and "runs afoul" of *Bisso*'s overreaching rationale (Pet. 11).

As noted by the District Court, *Bisso*'s negligence deterrence rationale has no bearing on a ship repair situation. Petitioners, however, censure the Ninth Circuit decision as "an indictment of Zidell's conduct and a vindication of *Bisso's* negligence deterrence policy" (Pet. 16).

Even if *Bisso's* negligence deterrence reasoning were applicable, petitioners' indictment rings hollow. First, the jury found *concurrent* negligence on the part of each party (RT 455). Petitioners maintained a locked supply room adjacent to the welding site in which flammable materials were stored (RT 307-309, 315-316, 260). Second, the parties worked closely together on the conversion; petitioners maintained daily contact, gave advice and instructions on the conversion and employed their own crew on the project (RT 171-173, 270, 318). The welding which allegedly

caused the fire was done at the direction of Mr. Kent (RT 308, 310). In fact, the clause at issue was incorporated in the contract because the two entities were massing men and equipment on a single job site (RT 325-326). Assuming, *arguendo*, that public policy might resist an exculpatory clause which allocated the loss attributable to a person's *sole negligence* to another (as in *Bisso*), such a rule should not be applied in the present context where both parties control the worksite and combine to cause the harm.

In addition, businessmen recognize that risks are inevitable and seek to apportion risk and insure against costly and lengthy lawsuits by entering into contracts which allocate loss and by the judicious use of insurance to diffuse the risk. "Systematic negligence" would defeat these ends. Intentional conduct or willful action frequently voids insurance coverage

and the loss of a vessel increases the loss of time and money to *both parties* -- the very risk sought to be minimized by the clause.

Petitioners also contend that the Ninth Circuit "runs afoul" of *Bisso*'s overreaching rationale (Pet. 11). However, this change is as untrue as it is vague.

First, *Bisso* cited "potential monopolistic powers" as weighing against enforcement of a "red letter" clause. *Bisso*, 349 U.S. at 631. Petitioners contend that Zidell owned a functional monopoly *vis-a-vis* petitioners and that petitioners could only submit to the contract (Pet. 22). However, petitioners *admit* that after paying their bill in March, nothing prevented them from removing their vessel and employing another shipyard (RT 223-224). Between March and May of 1979, petitioners were free to take the vessel elsewhere. Instead, fully aware of

the contract and exculpatory clause (Exs. 3, 4, 8; RT 212, 220-221, 225, 280, 291, 344), petitioners chose to continue the contractual relationship into which they voluntarily and freely entered (e.g., RT 203, 205, 226-228, 277-278, 287, 339, 341, 351). Petitioners contend that had they removed the vessel, they would have been subject to a suit for breach of contract (Pet. 24). The possibility of such a lawsuit has never been forwarded by Zidell nor evidenced in the record. Petitioners cannot now rely on such unproven (and false) post-fact speculation.

Petitioners' overreaching charge must fail for a second reason. Petitioners fail to realize that a "red letter" clause in a ship repair contract, as in *any* admiralty contract, is unenforceable *whenever* overreaching is proven. *Hall-Scott, supra*. Therefore, the decision below runs afoul of both *Hall-Scott, supra* and *Bisso*'s

overreaching rationale, if and only if overreaching is evident. The record, however, demonstrates that the contract was freely entered into by two experienced marine business concerns (*see* Respondent's Statement of the Case, *supra*). The District Court concluded that petitioners were not the victims of overreaching (Pet. 22a). The Ninth Circuit observed that the trial court's finding with regard to overreaching could not be disturbed unless clearly erroneous[4] (Pet. 10a) and affirmed the District Court's finding (Pet. 11a). In effect, Messrs. Morton and Kent base their petition on the hope that the Supreme Court will overturn a trial court finding of fact. This, of course, is not grounds for granting the petition (*see* Rules of the Supreme Court, Rule 17).

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[4]*See Anaconda Building Materials Co. v. Newland*, 336 F.2d 625, 628 (9th Cir. 1964).

2. The Ninth Circuit's Decision Below Is Not in Conflict with the Decisions of Other Courts of Appeal.

Petitioners contend that the Ninth Circuit's holding conflicts with First Circuit authority applying *Bisso* to ship storage contracts (Pet. 25). These cases are inapposite for two reasons.

First, the First Circuit has applied *Bisso* only to *ship storage* contracts, not to ship repair contracts. Second, the First Circuit cases are self-limiting. In *Fireman's Fund Am. Ins. Co. v. Boston Harbor Marina*, 406 F.2d 917 (1st Cir. 1969), the First Circuit discussed, *sua sponte*, the *possible* relevance of *Bisso* to a ship storage contract in light of *Bisso*'s stated applicability to bailment situations, *Bisso*, 349 U.S. at 632, and the *possibility* that a monopoly and adhesion contract were present. *Boston Harbor Marina, supra*, 406 F.2d at 920, 921.

However, the First Circuit *remanded* the case for further proceedings in light of *Bisso* and made no final pronouncement as to *Bisso*'s applicability. *Boston Harbor Marina, supra*, 406 F.2d at 921. The case was never retried.

Petitioners also seek solace in *Fireman's Fund American Ins. Co. v. Capt. Fowler's Marina, Inc.*, 343 F. Supp. 347 (D. Mass. 1971). This case, which was not appealed to the First Circuit, also involved the storage of a yacht. The court found a bailor-bailee relationship and ruled that a "red letter" clause would fail under *either* the Massachusetts Uniform Commercial Code *or* the public policy rationale of *Bisso*. *Capt. Fowler's Marina, supra*, 343 F. Supp. at 349. However, the court did not elaborate upon its summary conclusion that *Bisso* would apply. Therefore, nothing in the opinion bolsters petitioners' position.

The Fifth Circuit decisions cited by petitioners are not in conflict with *Bisso*, *Hall-Scott*, or the above First Circuit decisions. The Fifth Circuit, in *Alcoa Steamship Company v. Charles Ferran & Company*, 383 F.2d 486 (5th Cir. 1967), *cert. denied*, 393 U.S. 836, 89 S. Ct. 111, 21 L. Ed. 2d 107 (1968), and *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401 (5th Cir. 1982), has enforced provisions which limit a shipyard's liability to $300,000 under a ship-repair contract. These cases are consistent with the Ninth Circuit, at least where liability is limited by contract to $300,000. Petitioners cannot, and do not, contend that a different holding would result if all liability were limited as in the instant case.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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